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Memorandum

To:	Honorable Mayor and City Council
From:	Interim City Manager Sean Joyce and City Attorney Scott Smith
Date:	December 14, 2022
Re:	Point of Order Regarding Nomination and Election of Mayor Pro Tem

SUMMARY

The City Council elected a new Mayor and Mayor Pro Tem at its December 6, 2023 meeting. The following day, Councilmember Gene James filed a point of order on the election process for the Mayor Pro Tem (the "appeal"). The City Council Policy detailed below allows Councilmembers to raise and resolve points of order at any time.

This point of order raises the question of whether elections for Council offices should be treated as (1) a "round" of voting, with all nominees in consideration until one nominee receives a majority of Council votes (the procedure followed) or (2) a series of stand-alone motions and substitute motions (the procedure advocated in the appeal). After reviewing the meeting proceedings and the guidance provided in the Council Policy and Rosenberg's Rules of Order and analogous rules on this subject, the City Attorney recommends that the Council affirm the former interpretation, as used on the 6th. The Council, however, has the option to apply the latter interpretation, but in doing that should then vote on the nominees in reverse order with the second nomination standing as a substitute motion on the first.

DISCUSSION

Statement of Facts

On December 6, 2022, the City Council considered the election of its officers, resulting in the selection of Mayor Duncan and Mayor Pro Tem Knoblock under the procedure recommended and utilized for the nominations and election. After the Council meeting, Councilmember James raised the following point of order regarding the election process of the Mayor Pro Tem:

> "Under Rosenberg's Rules a vote of 2 YES. 1 NO and 2 Abstain passes …we had that vote last on Victor Cabral. Unfortunately, that was not the ruling. I implore you to review Rosenberg's. [We] need to cure this immediately."

In essence, this appeal asserts that the election was not a round of voting on a series of nominees, but rather a vote on a stand-alone motion to elect Councilmember Cabral as Mayor Pro Tem. Councilmember Cabral received two votes in favor (Cabral and James), one vote in opposition (Duncan), and two abstentions (Knoblock and Enmeier) – i.e., a 2-1-2 vote. Under this stand-alone motion theory, the appeal reasons that Councilmember Cabral received a majority of the votes cast in a motion to elect him, and thus, was elected as Mayor Pro Tem.

Points of Order

Points of Order are governed by Council Policy 1201-11 (the "Policy").The Policy provides that the Mayor, with assistance from the City Attorney, is designated as the parliamentarian for City Council meetings.[1] Points of order may be raised at any time by City Councilmembers, which shall then be considered by the Mayor. The City Council may override any parliamentary decision of the Mayor with a majority vote. (Section 4.1.2.)

Here, because the point of order was raised in this appeal after the meeting, this matter is being brought back to the Council post facto, using the process for resolving points of order from the public. As such, it is presented to the Council for consideration at the Council meeting where the previous meeting's minutes are considered. At this time, the Mayor and Council can review the point of order raised and "determine whether it warrants scheduling and noticing of that item for reconsideration." (*Id.*) Because Section 4.2.2 of Policy 1201-11 provides that "[t]he Mayor and Mayor Pro Tempore shall serve a one-year term *at the pleasure of the Council majority*" (emphasis added), the Council is not bound by a reconsideration process; it can elect new officers at any time (subject to public notice) and can skip the step of reconsideration to proceed directly to a new vote.

The Policy provides that "no ordinance, resolution, proceeding or other action of the City Council shall be invalidated or the legality thereof otherwise affected by the failure or omission to observe or following such rules." (Section 4.1.1.) Therefore, even with deviations from the parliamentary procedures, the Council's actions are legitimate and enforceable unless reversed by Council.

Election Procedure – Open Nominations

This section describes the procedure applied to the December 6th elections.

State law prescribes no particular method for Council's election of its officers. Government Code section 36801 simply grants the City Council the authority to select the Mayor and Mayor Pro

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[1] The City Clerk stood in for the Mayor in this instance.

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Tem. City Council Policy 1201-11 provides that Rosenberg's Rules of Order shall govern on all matters pertaining to parliamentary procedure. (Section 4.1.1.)

The starting point for Rosenberg's Rules is motions and votes on motions; motions are carried by a majority of those voting. (See below.) Rosenberg's contains some additional, minimal guidance on the specific issue of parliamentary procedures for nominating and electing officers (i.e., the Mayor and Mayor Pro Tem):

> "**Motion to close nominations**. When choosing officers of the body (such as the chair), *nominations are in order* either from a nominating committee or from the floor of the body. A motion to close nominations effectively cuts off the right of the minority to nominate officers and it requires a two-thirds vote to pass." (Emphasis added.)

This passage suggested to the City Attorney that Rosenberg's contemplates a system of electing officers where all nominees are simultaneously in play (not just the first one nominated) until one nominee receives a majority of votes. But unfortunately, Rosenberg's lacks guidance on what to do after that.

In the City Attorney's experience, and in the experience of BB&K's Director of Election Services, agencies traditionally use Robert's Rules of Order to supplement these election procedures where both Rosenberg's Rules and local policy are silent. Robert's' procedure of nominating and selecting officers can be summarized as follows: The "vita-voce" method of nomination is an "open nomination" solely by and from within the membership of the presently-seated board. Nominations cannot be accepted from members of the public. No "second" is required for nomination, although sometimes members will second a nomination to indicate endorsement. After the nomination period, a motion to close the nomination period may be made and seconded and a roll-call vote then ensues, which requires a 2/3 majority of the body.

Nominees are voted on in the order in which they are nominated (note that this is a mere roll-call vote). As soon as one of the nominees receives a vote of the majority of members participating *in that round of voting*, the chair then declares that person elected to that respective office, and no vote is taken on the remaining nominee(s). When a nominee does not secure the majority votes necessary, the next nominee is voted upon. This procedure continues in succeeding rounds of voting until a nominee receives votes from a majority of the body participating.

Robert's notes that in connection with this process, members of the body may vote in connection with multiple nominees, voting "yes" for their candidate and "no" or abstaining on the others. (Robert's Rules of Order, Sec. 46.) So, for example, if a member supports Candidate B, that member might vote against Candidate A or abstain in the vote on Candidate A, then later vote in favor of Candidate B. The intent of their "no" vote or abstention on Candidate A can't be ascertained until the vote on all nominees is completed or until one nominee receives votes from a majority of the members thus mooting the need to vote on the remaining nominees. A person

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may vote twice: once against A, then for B. A person may also abstain on A then vote for B. Their vote is not "spent" or over with the "no" or abstention on any candidate until the election on nominees plays out.

Under this interpretation of Rosenberg's with the overlay of Robert's (via the Rosenberg's reference to multiple nominees), the Council correctly voted on all nominees on December 6th, voting and tallying votes until the second nominee (Knoblock) received votes from a majority of the Council.[2]

Election Procedure – Simple Motions

This second section describes the alternative procedure proposed in the appeal of the point of order.

The appeal argues – in contrast to the parliamentary call made at the meeting and the analysis above – that the Council faced a simple motion to elect Councilmember Cabral as Mayor Pro Tem, which should have been considered alone. The 2-1-2 vote should have been considered as a successful outcome of the stand-alone motion that passed with the support of a majority of those *voting on the motion*. Rosenberg's Rules provide that when the rules of the body are silent on which method, the default rule is that the body counts all votes that are "present and voting." So, a 2-1-2 vote would have been sufficient. Under the "present and voting" method, members present are counted for purposes of determining a quorum, but are not considered in the motion itself. Therefore, in a traditional motion that does not require a majority of the body, a 2-1-2 (two in favor, one opposed, and two abstentions) vote on a motion would result on its passage.

On this point, the appeal is technically correct. However, this interpretation does not acknowledge the unique status of "no" and abstention votes early in voting rounds, i.e., that someone wishing to vote for a later-nominated candidate has not really cast their vote until their candidate is called. It also ignores Rosenberg's reference to multiple nominees and the potential need to close those nominations.

It is possible that the "no" and abstention voters in this election were never going to vote (and they might have been confused or induced to vote by the City Attorney's assertion at the meeting that a majority of the body's vote was required). Nevertheless, the Council couldn't have known this without proceeding to the vote on the second candidate to see their response to his nomination.

Finally, applying this "simple motion" interpretation to the Mayor Pro Tem election does not – in itself – resolve this matter. A pure motion/second process under Rosenberg's would require treatment of Councilmember Knoblock's nomination as a substitute motion. Rosenberg's provide that when there are multiple motions on the floor (after motions and seconds), the first vote should proceed on the last motion made. If that substitute motion passes then no vote is taken on the first motion. Therefore, under the appeal's interpretation of Council parliamentary procedures, the Council should have voted on Mayor Pro Tem Knoblock's nomination first. If that had still

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[2] The Council employed this same process for the election of Mayor.

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resulted in three votes, the first motion on Councilmember Cabral's nomination would have been moot. Thus, even if considering the simple motion approach, with the same alignment of votes, it might logically be assumed that Mayor Pro Tem Knoblock would have been elected.

COUNCIL OPTIONS

As noted above, the Policy provides that the Council will review the point of order raised on appeal and determine whether it warrants scheduling and noticing the underlying action for reconsideration.

Should the Council wish to reverse the decision on the point of order, it could do so, then skip a vote on reconsideration by scheduling a new vote subject to the replacement procedure. This is possible because the Council officers serve "at its pleasure." If the Council reverses this procedural call, it can agendize a new vote on Mayor Pro Tem at the next Council meeting (with just a consensus of two).

RECOMMENDATION

We recommend that the City Council deny the appeal and uphold the point of order decision from the meeting on December 6th.

In the alternative, the Council could remove this item from the consent calendar, uphold the appeal by reversing the point of order decision, and agendize the election of Mayor Pro Tem for a future Council meeting.

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